

# **KENTUCKY DEPARTMENT OF EDUCATION**

## **STAFF NOTE**

### **Review Item:**

702 KAR 6:090, Minimum Nutritional Standards for Foods and Beverages available on public school campuses during the school day

### **Applicable Statute or Regulation:**

KRS 156.035; KRS 156.160; KRS 156.200, KRS 158.XXX

### **History/Background:**

***Existing Policy.*** In 1990, the Kentucky Board of Education (KBE) promulgated an administrative regulation that restricted the time during which schools could conduct sales of food and beverages in competition with the School Breakfast and National School Lunch Programs.

In the 2005 regular session, the Kentucky General Assembly passed SB 172, creating new sections of KRS 158. The bill was signed by the Governor and takes effect on June 20, 2005. Among other things, the bill requires that the KBE promulgate an administrative regulation specifying “the minimum nutritional standards for all foods and beverages that are sold outside the National School Breakfast and National School Lunch programs, whether in vending machines, school stores, canteens, or a la carte cafeteria sales.” The language goes on to specify that the “administrative regulation shall address serving size, sugar, and fat content of the foods and beverages.”

Staff is recommending that KBE use the current 702 KAR 6:090 as a vehicle and amend it to meet the mandate in SB 172. This proposed regulation has generated considerable attention and diverse points of view.

### **Policy Issue(s):**

The proposed amendments to 702 KAR 6:090 will bring the regulation into conformance with the mandate in SB 172. The changes include:

**Page 1, lines 5-21 and Page 2, lines 1-2** – Changes the regulation title, “Relates to” clause, “Statutory Authority” clause, “Necessity, Function and Conformity” clause.

**Page 2, lines 3-16** – Stipulates the minimum nutritional standards for beverages that may be made available through vending machines, school stores, canteens, etc., in elementary

schools during the period of time between thirty (30) minutes after lunch until the end of the last instructional period.

Rationale: The stipulation regarding volume has been recommended by staff and is supported by the Heart Association and The Action for Healthy Kids Task Force. We see a need to control portion size for two reasons. First, we need to begin to educate students regarding appropriate portion size, even with beverages. Second, we need to avoid teaching children that it is enough to “drink” a meal.

The Kentucky Beverage Association opposes this recommendation, noting that while vending machines do offer controlled portions, restaurants, convenience stores and fast food establishments do not, and this proposed limit at school might encourage students to want and consume larger portions outside of school.

Although it does not appear in the legislative language, staff has added “100% vegetable juice, or a combination of fruit and vegetable juices equaling 100%” to this section. Vegetable juices add more nutrient dense calories than the 100% fruit juices, which are composed of mostly water and a large volume of sugar. As the Kentucky Beverage Association has accurately pointed out: 100% apple juice contains 26 grams of sugar per 8 ounce serving and 100% orange juice contains 23 grams of sugar per 8 ounce serving.

**Page 2, lines 17-22 and page 3, lines 1-5** – Contains new language setting minimum nutritional standards for beverages that may be made available from vending machines, school stores, canteens, and fund raisers in middle and high schools during the period of time beginning thirty (30) minutes after the last lunch period and ending at the close of the school day (defined as the close of the last instructional period).

Rationale: The Kentucky Beverage Association opposes all of the language in this section. Their position is that the legislative language regarding beverages puts limits only on beverages available in elementary schools and that should be reflected in this proposed amendment. Staff and other advocates disagree. It should be noted that while the legislative language does put restrictions on beverages in elementary schools, the language requires an administrative regulation setting minimum nutritional standards for all foods and beverages available and that serving size, sugar and fat content must be addressed. That language [in Section 4(1) of the bill] does not prohibit regulation in middle and high schools. Accordingly, we disagree that the language in this section exceeds the legislative intent in SB 172.

The restrictions on sodium and caffeine are specifically included to prohibit sales of diet, caffeine-free soft drinks until the school day has ended. Those drinks displace consumption of healthier beverages. There is also no provision for so-called “juice drinks/vegetable drinks/sports drinks.” Again, those drinks displace consumption of healthier beverages and promote tooth decay. Sports drinks may be made available after school, when athletic practices take place.

**Page 3, lines 6-8** – Contains language detailing what beverage standards apply when a school has a combination of elementary and middle grades.

- a. **Page 3, line 9-23 and page 4, lines 1-19** – Contains new language setting minimum nutritional standards for food items that may be made available in elementary, middle and high schools from vending machines, school stores, canteens, fund raisers and teachers as rewards for class room behavior, during the period of time beginning thirty (30) minutes after the last lunch period until the close of the school day (as previously defined).

Rationale: There has been some reaction to these standards, mostly positive in tone. However, reaction differs with some portion sizes, although those differences are very minor, for example, .75 ounces on chips and crackers and .25 ounces on trail mix, nuts and seeds. Staff feels that the portion sizes proposed are very reasonable - the first of its kind in the nation at the statewide level - and should be adopted as written. There is agreement with regard to sodium restrictions, calories from fat and saturated fat, and sugar.

The Kentucky Association of School Administrators has expressed the opinion that these restrictions are “harsh” and not reflective of the legislative intent of SB 172. Staff respectfully disagrees with that assessment. The language restricting use of some food items as rewards for classroom behavior is particularly important, and we hope that the various colleges of education will adopt this new approach for its teachers in training.

**Page 4, lines 19-23 and page 5, lines 1-4** – Contains new language setting minimum nutritional standards for food and beverage items offered for sale as on an a la carte basis on the cafeteria line during the serving of breakfast or lunch.

Rationale: Staff has given considerable thought to this language. Some in the advocacy community propose limiting the a la carte serving and/or the portion size of some otherwise creditable items. Menu planning is at the heart of the operation of the breakfast and lunch programs, and the meal pattern is the starting point for menu planning. Those items have been and remain the subject of considerable scrutiny on the part of United States Department of Agriculture (USDA). The virtues of using the meal pattern are several: (1) It provides items that have been the object of scrutiny by the United States Congress and the federal agency responsible for these programs and the funding of them; (2) Referencing the meal pattern prevents KBE from having to amend this proposed regulation when changes to the meal pattern occur; (3) Referencing the meal pattern will prevent confusion for menu planners; (4) Referencing the meal pattern will avoid the impossible compliance situation where there are not enough staff at KDE, the Cabinet for Health and Families, and in the local health departments to monitor how much of which items schools are offering on the a la carte lines; and (5) Referencing the meal pattern will allow maximum use of donated commodities, some of which do not meet the “standards” of some in the advocacy community.

Since virtually all of the district food service programs are self-supporting (with about half of them assisting the General Fund by the payment of indirect costs), we consider the use of the meal pattern here to be significant for the long-term health of the programs. Although not in the proposed amendment, one avenue of compromise might be to allow the a la carte sale of

any creditable item but limit the portion size to the age and grade range specified in the meal pattern regulations. Staff offers this for consideration without recommending it.

**Page 5, lines 5-16** – Contains new language dealing with the required annual assessments and reporting of the status of school nutrition in the districts. The language sets timelines for the first annual reports (due to the local board on or before May 1, 2005) and the first annual plans for improvement (to be done by local boards on or before January 31, 2006), and summaries due to the KBE on or before March 1, 2006. The legislative language requires that the report include specific items and be made in writing to parents, the local school board and school-based decision making councils, but does not include direction as to the timing or the format of the assessments or the reports.

Rationale: Although the legislative language does not include direction as to the timing of the assessment and the report, we have set what we believe to be reasonable timelines for those items. Staff has also developed an assessment tool, “The Standards and Indicators for School Nutrition Programs” (Attachment B, but not incorporated by reference). This instrument is formatted very similarly to the more familiar Standards and Indicators for School Improvement (SISI) document used for school improvement purposes. We hope districts will use the instrument to conduct the required assessment and will strongly encourage it. Staff has also developed a reporting instrument, “The Nutrition and Physical Activity Report Card,” (Attachment C) and will encourage districts to use it as well. Staff strongly believes that consistency in assessment and reporting instruments and formats will make the reports much more meaningful to the various audiences receiving the reports.

The legislative language requires that the reports include a "list of foods and beverages that are available to students, including the nutritional value of those foods and beverages." This represents a particularly burdensome requirement, especially in view of the fact that a medium-size district may have as many as 200-300 items on the food service program bid, not to mention the items that are available from other sources such as vending machines and school stores. Add the requirement for the nutritional value of each of those items and that reporting requirement becomes onerous in terms of both printing and postage costs.

Staff proposes to allow districts to make that list available on the district web site while informing the required audiences of the availability of the list through an announcement in the “Report Card.” The other required elements of the report are included in the “Report Card.” Staff believes the advocacy community, based on communication from the Heart Association, will favorably receive this approach.

Not as favorably accepted is our suggestion that the every five-year review required by federal regulations and conducted by our staff substitute for the school nutrition assessment and that the recommendations from that report form the basis for the SB 172 report and required improvement plan. Currently, our review covers many of the same areas and more, and if necessary, our assessment instrument can be augmented. We recommend that the KBE look favorably on the language as presented.

**Page 5, lines 17-23 and page 6, line 1** – Contains new language dealing with the required annual assessments and reporting of the “physical activity environment” in the districts. The language sets timelines for the annual reports.

Rationale: In the absence of more specific legislative guidance, we have set what we believe are reasonable timelines for the annual assessments and reporting. In lieu of duplicating existing resources, staff is recommending that districts use the Physical Education and Physical Activity module of the School Health Index from the Centers for Disease Control and Prevention (CDC) (Attachment D) as the instrument to assess the physical activity environment and the previously mentioned “Nutrition and Physical Activity Report Card” to report the same. Staff believes that consistency in the use of instruments and reporting formats will facilitate communication with the various audiences.

Staff believes that the language on page 5, lines 1-19, will be helpful to districts, but will await the KBE guidance as to whether to include it.

**Page 6, lines 2-9** – Delete current regulatory language.

The issue of defining "retail fast foods" as specified in Section 2 of SB 172 exists. The issue is whether or not "pizza" is defined as a retail fast food. While the final decision is the Board's, staff recommends that pizza be included in the types of food items that are referred to in Section 2 of SB 172 as “retail fast foods”. Of all the retail establishments with which districts contract to provide food items, those that provide pizza comprise the overwhelming majority of those contracts. Pizza is available on as fast a basis as any other so-called “fast food”. Two examples come to mind: Fazoli's offers pizza by the slice or pie through the drive-thru line while Sbarro's offers pizza by the pie or slice at mall food courts. In both cases, the service is as fast if not faster than any other retail fast food establishment.

Staff has also been asked to deal with one final issue in the proposed amendment - that of eliminating the use of deep-frying as a food preparation method. As you can see from the language before you, we have declined that request. Increasingly, we have seen elementary schools removing or at least ceasing use of deep fryers. Staff that review kitchen construction/renovation plans recommend against purchase/installation of deep fryers. The federal requirements of no more than 30% of calories from fat/10% from saturated fat mitigate against deep frying anyway. Eliminating a food preparation method will do nothing to further the goal of educating children with regard to variety and balance in the diet accompanied by physical activity. Staff recommends that the KBE decline this request.

#### **Impact on Getting to Proficiency:**

Healthier children learn at higher levels.

#### **Groups Consulted and Brief Summary of Responses:**

Kentucky Association of School Administrators  
Kentucky School Boards Association

Kentucky Beverage Association  
American Heart Association  
Kentucky Action for Healthy Kids Task Force  
Foundation for a Healthy Kentucky  
Kentucky School Nutrition Association (formerly the Kentucky School Food Service Association)  
Local Superintendents Advisory Council (LSAC)

Responses from the various groups have been included in the discussion of staff recommendations and rationales. The Local Superintendents Advisory Council's input will be forwarded to the KBE via a letter from that body.

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**Deputy Commissioner**

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**Commissioner of Education**

**Date:**

June 2005